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September 25, 2014
NND-14-0600

Jeff Lyash
President, Power
CB&I Stone & Webster
128 S. Tryon Street, Suite 100
Charlotte, NC 28202

Subject: V.C. Summer Units 2 and 3 Guaranteed Substantial Completion Dates

- Reference:
- (1) Engineering, Procurement, and Construction Agreement for AP 1000 Nuclear Power Plants, Dated May 23, 2008 – V.C. Summer Units 2 and 3
 - (2) VSP_VSG_002024, dated August 6, 2012
 - (3) Owner's unnumbered letter, dated May 6, 2014
 - (4) VSP_VSG_002819, dated July 16, 2014
 - (5) VSP_VSG_002861, dated July 25, 2014
 - (6) Consortium's unnumbered letter, dated July 25, 2014
 - (7) VSS_VSG_002044, dated September 16, 2014

Dear Mr. Lyash:

The Consortium's letter of July 16, 2014 (reference 4), its two letters of July 25, 2014 (reference 5 and 6), and your letter of September 16, 2014 (reference 7) address three issues to which we wish to respond here, with the hope of putting them to rest.

The first issue is the cause of the various project delays that appear certain to prevent the Consortium from achieving the agreed Guaranteed Substantial Completion Dates (GSCDs) of March 15, 2017, and May 15, 2018. The second issue is the Consortium's contention that it should benefit from its unexcused delays by receiving excess escalation payments. The third issue is the Consortium's analogous contention

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that it should benefit from certain Project Payment Schedules, although those schedules are out of sync with the Consortium's actual progress due to its unexcused delays.

I. THE CONSORTIUM IS RESPONSIBLE FOR THE CURRENT PROJECT DELAYS

With respect to the first issue—the cause of the project delays—the Owner provided a detailed account of the Consortium's performance deficiencies relating to the structural modules and project design, in its letter of May 6, 2014 (Reference 3). That account was incomplete. It did not provide an exhaustive list of all the Consortium's performance deficiencies or a complete statement of the Owner's damages. Nonetheless, it was sufficient to show that the Project Delays are the Consortium's responsibility.

The Consortium indirectly responded to our account in its letter of July 16, 2014 (Reference 4) by denying that it is responsible for all costs associated with the Project delays. The Consortium had not previously identified any circumstances or events that would justify a schedule extension, and even its July 16, 2014 letter failed to do so. Although that letter alluded to regulatory-driven changes and unforeseeable events that complicated the Consortium's task of re-baselining the Project Schedule, the letter provided no details about those matters and fell well short of the EPC Agreement standards for Notice of a Change. The Consortium responded more directly to our account in its letter of July 25, 2014 (Reference 6) but still did not provide any details to justify the delays. The letter merely referred vaguely to regulatory-driven changes and events that allegedly impacted the Consortium's efficiency.

We conclude from all this that the Consortium has no grounds for a Change to the Project Schedule and all Project delays to date are unexcused. We address certain implications of these unexcused delays in the next two sections of this letter.

II. THE CONSORTIUM IS NOT ENTITLED TO EXCESS ESCALATION PAYMENTS

The second issue relates to escalation payments. The EPC Agreement was originally priced using 2007 dollars. Under that agreement, the Consortium agreed to perform in accordance with the Project Schedule, with the understanding that the Owner would make escalated payments in later calendar years for Firm Price work completed according to the Project Schedule.

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In its letters, the Consortium contends that, where the Consortium fails to complete the various parts of the Project when agreed, the Owner must continue to escalate the Milestone Payments until the Consortium finally does complete such parts of the Project, regardless of the cause of the delay. This contention inappropriately divorces the Price Adjustment Provisions from the context of the EPC Agreement. Under that agreement, the Price Adjustment Provisions are interconnected with the Milestone Payment Schedules and the Project Schedule. These interconnected components of the EPC Agreement require the Contractor to perform in accordance with the Project Schedule and condition escalation of Milestone Payments on the Consortium's timely completion of the Project Schedule activities. Nothing in the EPC Agreement or normal business practices suggests that the Consortium should reap a financial benefit, in the form of excess escalation payments, when the Consortium is responsible for late completion of the Milestones.

To support its contention about excess escalation payments, the Consortium points to the Liquidated Damages provision in the EPC Agreement. That provision states that Liquidated Damages are the Owner's exclusive remedy for the Consortium's failure to achieve Substantial Completion of a Unit on or before the GSCD for such Unit. The Liquidated Damages provision does not control the excess escalation question, however, because neither of two key features of that provision applies here. The Owner is not seeking at this time any additional remedy beyond Liquidated Damages. And the excess escalation payments in question are not associated with delays to the GSCDs.

The Liquidated Damages provision does not control the escalation issue, because the Owner is not seeking a remedy with respect to excess escalation payments. Instead, it is the Consortium that is seeking a remedy, namely, the recovery of excess escalation payments associated with its unexcused delay. If the Consortium intended to assert a Claim for delay damages, such as escalation costs, the Consortium would have to comply with the Claim provisions of the EPC Agreement and show, among other things, that the delays were excusable. In addition, the Consortium would also have to show that it actually incurred additional escalation costs in connection with the Milestone payments. The Liquidated Damages provision does nothing to relieve the Consortium of these requirements, neither of which the Consortium has met or could meet.

The Liquidated Damages provision also does not control the excess escalation issue because it does not address the Owner's remedies for late completion of Project Milestones. That provision expressly applies only to late Substantial Completion. The daily Liquidated Damages amounts are reasonably related to the revenue that the

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Owner would lose by not being able to produce and sell power in the event of delays to Substantial Completion. Consequently, the Liquidated Damages provision is limited to late Substantial Completion and establishes the exclusive remedy for the Consortium's failure to achieve Substantial Completion by the agreed GSCDs, but only for such failure. The Liquidated Damages provision does not exclude or limit the Owner's remedies for other Consortium delays, such as the Consortium's failure to achieve Milestones on the dates stated in the Project Schedule. The Liquidated Damages provision is silent as to those other delays and, therefore, does not limit the Owner's associated remedies.

In its letters of July 25, 2014 (reference 5) and September 16, 2014 (reference 7), the Consortium requests that the Owner make partial payment of the excess escalation amounts, pending resolution of the dispute, under Article 8 of the EPC Agreement. We acknowledge that Article 8 addresses payment for disputed Claims, but that article is subject to several limitations. First and foremost, the article is limited by the parties' mutual obligation to deal with one another fairly and in good faith. Due to this limitation, the Consortium could not bill the Owner for completely unrelated items, such as work on Plant Vogtle, or, if it did so, it would have no right to payment of 90% of the invoiced amount, pending resolution of the inevitable dispute.

Billings for disputed Claims are also subject to additional limitations imposed by other parts of the EPC Agreement. For example, Article 27 requires that a Claim be initiated by written notice and makes such notice a condition precedent to any further proceedings with respect to a Claim. That article also puts the burden of substantiating a Claim on the Party making the Claim. Article 9 states that any changed work performed before execution of a Change Order is at the Consortium's risk.

The limitations imposed by Article 9 and 27 must be read together with Article 8. In combination, these articles do not require any payment for a disputed Claim until the Consortium first takes certain steps to establish the Claim. The steps include giving proper notice and providing supporting information to substantiate the Claim. As noted above, the Consortium has not taken any of the necessary steps.

III. CERTAIN PROJECT PAYMENTS SCHEDULES SHOULD BE ADJUSTED

The third issue relates to certain Project Payment Schedules that are calendar-based but are out of sync with the Consortium's currently anticipated completion dates of the Project components. Those Payment Schedules, in their current form, would require full payment well in advance of when the Consortium expects to complete the

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Project. The disconnect is almost certain to worsen with the upcoming re-baselined work schedule.

We have addressed this problem by rejecting recent requests for payments that were not justified by the Consortium's current Project Schedule, although we have not approved that schedule. Once we accept the new re-baselined work Project Schedule, we will reject payments that are not justified by the re-baselined Project Schedule. The justification for these adjustments is much the same as the justification, stated above, for not making excess escalation payments. The Consortium has no right to be rewarded for unexcused Project delays by receiving payment in advance of when it actually performs the work.

Please advise if you have any questions about these matters.

Sincerely,



Stephen A. Byrne
President, Generation & Transmission
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